LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JAN 19 1952
CHARLES ELMORE CROPLEY
CLERK

In

The Supreme Court

of the United States

OCTOBER TERM, 1951

No. 176

MORRIS LELAND,
Appellant;

vs.

THE STATE OF OREGON,
Appellee.

Appeal from the Supreme Court of the State of Oregon

BRIEF OF APPELLEE

JOHN B. McCOURT,
District Attorney,
Multnomah County,
Portland, Oregon,
J. RAYMOND CARSKADON and
CHARLES EUGENE RAYMOND, ESQ.,
Deputy District Attorneys,
Portland, Oregon.
GEORGE NEUNER,
Attorney General,
for State of Oregon,
Salem, Oregon,
Attorneys for Appellee.

THOMAS H. RYAN,
ANTHONY PELAY, JR.,
JOHN D. RYAN and
HAROLD L. DAVIDSON, ESQ.,
Attorneys for Appellant.

BLAKE-KEYSTONE PRESS

INDEX

Page

SUBJECT INDEX

Brief of Appellee 1

Opinion Below 1

Jurisdiction 2

Question Presented 2

Statement of Facts 3

Summary of Argument 9

Answer to First Assignment of Error 15

Argument 15

Answer to Second Assignment of Error 29

Argument 30

Answer to Third Assignment of Error 38

Argument 38

Conclusion 39

TABLE OF CASES CITED

Adamson v. California, 332 U. S. 46, 67, 68 16-27

Ashcroft v. Tennessee, 322 U. S. 143; 64 S. Ct. 921 30

Avery v. Alabama, 308 U. S. 444, 446; 60 S. Ct. 321 14-39

Chambers v. Florida, 309 U. S. 277; 60 S. Ct. 472 30-39

Gallegos v. Nebraska, Law Ed. Adv. Op., Vol. 96, No. 3, page 82 at page 88 17-35

Haley v. Ohio, 332 U. S. 596; 68 S. Ct. 302 30

Hysler v. Florida, 315 U. S. 411, 416, 417; 62 S. Ct. 688, 691 16

TABLE OF CASES CITED—Continued

Louisville & Nashville Railroad v. Schmidt, 177 U. S. 230, 236; 20 S. Ct. 620, 622 15

McNabb v. United States, 318 U. S. 332, 340 13-35

Morrison v. California, 291 U. S. 82, 284; 54 S. Ct. 281 24

Powell v. Alabama, 287 U. S. 45; 53 S. Ct. 55 28-30

McNaghten's Case, 8 Eng. Reprint, 718; Opinion of Judges, 10 Clark & Fin. 205 19

People v. Sprague, 2 Park Criminal Reports of N. Y. 43, 48 20

Perozzi v. Ganiere, 149 Or. 330, 343, 344; 40 P. 2d 1009 19

State v. Butchek, 121 Or. 144, 153; 253 P. 367 34

State v. Folkes, 174 Or. 568, 580; 150 P. 2d 17 34

State v. Garver, 190 Or. 291, 305 21

State v. Grieco, 184 Or. 253; 195 P. 2d 183 21

State v. Jordan, 146 Or. 504, 509, 510, 511; 26 P. 2d 558; 30 P. 2d 751 37

State v. Leland, 190 Or. 598, 605, 609, 617; 227 P. 2d 785; Record, 4 to 36, inc. 1-2-14-29-31-38

State v. Layton, 174 Or. 217, 230; 148 Pac. (2nd) 522 37

State v. Murray, 11 Or. 414; 5 P. 55 21

State v. Riley, 147 Or. 89, 99 26

State v. Wallace, 170 Or. 60, 79 18

Page

TEXTS CITED

Insanity as a Defense in Criminal Law, Weihofen, The Commonwealth Fund Publishers (1933) page 151, 152 20-24

Wigmore on Evidence (3rd Ed., 1940) Vol. 9, Article 2501(3) 24

STATUTES

Section 23-122, Oregon Compiled Laws Annotated 2-10-15-17-18-21

Section 26-929, Oregon Compiled Laws Annotated 2-10-15-17-21

Section 26-933, Oregon Compiled Laws Annotated 11-19-21-22

Section 26-955, Oregon Compiled Laws Annotated 11 18-21-25

Deady's Code (1845-1864) 19

United States Constitution: 14th Amendment 2-14-15-28-30

Oregon Constitution: Article XVIII, Section 7 19

In

The Supreme Court

of the United States

OCTOBER TERM, 1951

No. 176

MORRIS LELAND,
Appellant,

vs.

THE STATE OF OREGON,
Appellee.

Appeal from the Supreme Court of the State of Oregon

BRIEF OF APPELLEE

OPINION BELOW

The opinion of the Supreme Court of the State of Oregon is reported in 190 Or. 598; 227 P. (2d) 785. The denial of the petition for rehearing is found in the Journals of the Oregon Supreme Court for February 28, 1951, noted as a memorandum decision in Oregon Advance Sheets, Volume 52, No. 8, at page 2. Said denial for the petition for rehearing was not reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the brief of appellant.

QUESTION PRESENTED

The question presented by this appeal is the affirmance or reversal of the decision of the Supreme Court of the State of Oregon, recorded in 190 Or. 598, 227 P. (2d) 785, to be determined from the following:

A. Whether or not the Supreme Court of the State of Oregon erred in upholding the validity of the Oregon statutes regarding proof of insanity despite appellant's contention that said statutes 26-929 and 23-122 O.C.L.A. deprived the defendant of his life and liberty without due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution, nowithstanding defendant was required to prove he was insane beyond a reasonable doubt and whether or not defendant was permitted by statute to establish the mental disease from which he was suffering as defense to the crime.

B. Whether the Supreme Court of the State of Oregon erred in upholding the alleged refusal of the trial court to make available to defendant's counsel before trial the confession which defendant alleged was taken before he was advised of his right to be represented by counsel and before he was taken before a magistrate and whether said

error, if any, deprived defendant of his life and liberty without due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

C. Whether the Oregon Supreme Court erred in sustaining defendant's conviction of a sentence to death in the lethal chamber.

STATEMENT OF FACTS

Morris Leland, then of the age of 22 (R. 339), the appellant, when arrested on August 11, 1949, upon the charge of larceny of an automobile, asked the officer while being taken to the Police Station if he could talk to someone in homicide about a murder. While he was being "booked" at 2:00 a.m. he asked permission of the jailer to speak to a homicide officer about a murder. When the jailer inquired what murder (R. 56-57), he informed him of meeting a little girl who was going bean picking, of taking her down to a clump of trees by the river and of killing her (R. 64). The jailer called the homicide officers and when they arrived at the Police Station at approximately 2:07 a.m. August 11, 1949 (R. 53-54), Leland told these officers the same story, more in detail, and stated that he would direct them to the clump of trees by the river where the body lay but that he did not want to look at it (R. 86). The officers did not know of such a murder (R. 58).

At 2:30 a.m. on August 11, 1949, the officers, accom-

panied by Leland, left the Station for the scene (R. 60), arriving there at approximately 3:00 a.m. (R. 63). While enroute Leland related that he had met a fifteen year old girl between the hours of 4:00 a.m. and 4:30 a.m. on August 5 (R. 61), who had left her home in St. Johns carrying a little metal lunch box, that she was going to meet a girl friend and thereafter get a bus which would take them to the bean fields (R. 86). Leland stated he approached her at the point of a long knife (R. 65), caused her to walk to the Willamette River through a long circuitous route which skirted the business district of St. Johns, and then down to the river to a secluded clump of trees where he had been sleeping prior thereto (R. 61, 345). He stated he kept her prisoner there Friday, Friday night and Saturday morning at which time death released her (R. 61-62).

Friday he attempted to have sexual relations with her but did not complete the act because he found she was a virgin and that it hurt her (R. 367). Also during the day Friday he picked up a long iron bar down near the beach, contemplating he might need it to silence the girl if she started to scream (R. 353). Friday night he actually considered the possibility of killing her (R. 355). Saturday morning the defendant awoke and the girl was some 20 feet away from him. He told her she had better come back and she did. He told her to stay there for a while because, as he said later, "I was about to wind her off." (R. 356)

She wanted to go home and he wouldn't let her because he was afraid she would report this incident to the police and he would be arrested (R. 65).

Approximately 45 minutes passed when a freight train came by with a switching crew and the little girl began to scream. She screamed so loudly that the defendant thought the trainmen could hear her, so he took the iron bar and hit her over the head and hit her again and again. She went down to a sitting position and she tried to get up and he hit her across the bridge of the nose and she lost consciousness. Then he took the knife and plunged it through her unconscious body three times (R. 356 to 359). Later he said that he didn't look to see if she was dead, that he took it for granted that she was, that she should have been anyway (R. 342). Thus he accomplished that which he had considered the night before.

Having done that, he set about to get rid of the evidence. He took the little lunch box and wiped it clean so there would be no fingerprints on it. He covered the body with a blanket and then with driftwood. He threw the knife and iron bar into the river (R. 62, 358-359).

With the aid of flashlights, he led the officers by direct route through the thick underbrush to the body. It was found just as Leland had said, with the thick foliage and undergrowth and tangled bushes forming a natural hut which effectively screened the murder scene from view.

The girl lay in sort of pyre, covered with a blanket upon which tree limbs and driftwood had been placed, with her skull beaten and smashed, one eye was closed and a 4" wound on the left side of her forehead laying bare her skull, and three knife wounds through her chest. A wallet on the deceased identified her as Thelma Taylor (R. 87-88).

The officers returned with Leland to the St. Johns Precinct where the coroner and John R. Collier, Deputy District Attorney (Now deceased) were called. The officers were advised by the Missing Persons Bureau that Thelma Taylor had been previously reported missing by her parents and the description of her clothing tallied with the clothing on the deceased. When the coroner and Mr. Collier arrived, Leland again directed the group to the scene, at which time the coroner removed the body (R. 88-89)

Leland was then returned to the Police Station and was given his breakfast (R. 148) and at about 7:15 a.m. he was fully informed as to his constitutional rights by Mr. John R. Collier, and after being so advised Leland gave an account of the killing, in question and answer form before a court reporter (R. 112, 113, and 340). This account appears in the Appendix to the Record as State's Exhibit 15 (R. 338).

Later on the same day he directed other officers to a

place on the river near where the body was found, where the officers recovered the iron bar that had a handkerchief wrapped around one end and an M-3 Imperial trench knife just where and as Leland had described. Leland examined these two instruments of death and identified them as the ones he has used upon the girl (R. 138 to 141, 354). Leland was then returned to the Station.

At approximately 10:00 p.m. that evening new detectives were investigating this case and Leland was being interrogated by them, when he stated that he wished to make a written statement to them of this affair. They granted his wish, furnishing him with pen and paper and he made what is known as State's Exhibit 18 (R. 160-161), which appears on the Appendix to this Record (R. 367).

Morris Leland was arrested on August 11, 1949. His case was presented to the Grand Jury and an indictment was returned on the 18th day of August, 1949, charging the defendant with Murder in the First Degree.

On the 19th day of August, 1949, the defendant entered a plea of Not Guilty to the crime charged in the indictment. On August 30, 1949, a notice, motion and order were filed by his attorneys wherein the defendant pleaded not guilty by reason of insanity (R. 44). The case was set to be tried originally on the 22nd day of September, 1949. Following requests for continuance by counsel for the defense on September 8, the court extended the trial date first to October 24, 1949, and later to October 27, 1949.

On that date a jury was impanelled and sworn and the taking of testimony commenced November 2, 1949 (R. 5-6-7). The trial was concluded November 7, 1949.

During the trial defendant renewed his demand to see the confession and on the morning of the 3d of November, 1949, the second day that evidence was taken, the court offered to recess the trial to give defendant's counsel an opportunity to examine the confession after it had been offered and received into evidence. This offer was never taken advantage of by the defendant (R. 15 and 134). Also during the trial the defendant was given every opportunity to fully present his testimony on the issue of mental incapacity as well as the special defense of insanity. He was afforded every opportunity to present all his lay witnesses, his Good Samaritan Hospital record regarding his injury when a boy, the Oregon State Hospital record, his veteran's record, and the testimony of his two psychiatrists (R. 158, 159; 173 to 282; 317 to 319). The psychiatrists for the State testified Leland was sane (R. 290).

Appellant asserts in his statement of facts (Appellant's Brief, page 7)

> "the State Hospital at this time was inadequate. It was overcrowded, understaffed, and the authorities there used this lack of facilities as an excuse for turning loose on the public this known and mentally ill sex offender."

Appellee wishes to point out the testimony of Dr. Benjamin F. Williams to the effect that the release by the Ore-

gon State Hospital was the result of a psychiatric examination by the Board of Psychiatrists who found Leland sane, acting upon their best judgment because they did not consider him to be psychotic (R. 236-237).

Morris Leland was granted a full discharge from the Oregon State Hospital on April 24, 1944 as "not insane" (R. 397).

Evidence further disclosed that Morris Leland had an idea that he was tough, that people had better leave him alone and his father believed that he was just lazy, "downright lazy and will do anything to keep from working." (R. 387)

The court fully instructed the jury on the effect of the evidence of insanity, mental incapacity as well as that of legal insanity, and upon all elements of the crime under the Oregon law (R. 321 to 334).

The jury considered all phases of this case and arrived at its verdict finding the defendant guilty of Murder in the First Degree without recommendation of leniency (R. 44), which resulted in the sentence of death in the lethal chambers, affirmed by the Oregon Supreme Court (R. 36), rehearing denied (R. 39), from that decision he has appealed to this court (R. 3).

SUMMARY OF ARGUMENT

The appellee asserts that the appellant was accorded due process of law in every particular. The right of the

state to devise its own procedures for securing substantial justice is unquestioned. The appellant received a fair and impartial public trial in accordance with established criminal procedure, by an impartial judge and jury properly instructed. He had the right to be heard by himself and enjoyed the assistance of counsel. He was confronted with the nature and cause of the accusation against him and furnished with a copy thereof. He had compulsory process for obtaining witnesses in his favor. He was afforded the right to meet his witnesses face to face and given full opportunity to cross-examine the same.

Section 26-929 O.C.L.A. providing that the defendant be required to prove insanity beyond a reasonable doubt places the burden upon the defendant inasmuch as such defense is regarded as a special defense by way of excuse and for the purpose of determining the ultimate disposition of the defendant should he be found insane. The rule that the special defense of insanity is an affirmative one prevails in many jurisdictions throughout the United States.

Under Section 23-122 O.C.L.A. providing that a morbid propensity to commit prohibited acts by a person not shown to be incapable of knowing the wrongfulness of such act, definitely commits the state to the right and wrong test for determining legal insanity, which exists in most of the states of the union.

Section 26-933 O.C.L.A. furnishes the defendant with the presumption of innocence until the contrary is proven and likewise requires the prosecution to establish the guilt of defendant beyond a reasonable doubt. All of these statutes constitute a statement of the established legislative and judicial policy of this state. The state is always required to prove every element of its case, including premeditation, deliberation, malice and intent and so the above statutes coupled with Section 26-955 O.C.L.A. providing for a special verdict if defendant be found not guilty by reason of insanity and for the commitment of the defendant to a lunatic asylum if the court deems it dangerous for the defendant to be at large, the appellee asserts that said statutes fully protect the defendant within the meaning of the due process clause of the Constitution of the United States contained in the Fourteenth Amendment thereof.

The prosecution is required to prove each and every element of the crime such as that the defendant was of a normal mind and had mind enough to premeditate, deliberate, entertain purpose and form criminal intent. All of these elements as well as the other facts of the case must be established beyond a reasonable doubt. The presumption of sanity does not impoft guilt for guilt is never presumed. The presumption of innocence is not constitutionally guaranteed but exists only until the contrary is proved.

The Oregon procedure provides complete protection to

the defendant inasmuch as his testimony on mental incapacity may be heard and considered by the jury upon the question of the defendant's mental ability to premeditate, deliberate and form a criminal intent as well as the fact of whether or not he is legally insane.

The appellee agrees that due process is a living thing and not frozen and further states that under the above procedures the defendant is afforded the full advantage of having the jury weigh and consider the modern techniques of psychiatry as testified to by skilled and trained psychiatrists and therefore is not deprived of the defense of moral insanity, if any.

The undisputed facts in this case indicate the defendant was accorded due process in connection with the admission of his confession. They show the police did not know that murder had been done and that they were under no pressure to pin guilt on anyone. Quite the contrary, defendant Leland upon his arrest for larceny of an automobile voluntarily told the police about the murder, showed them where the body lay and assisted in finding the murder weapons. The accepted test of admissibility is the voluntariness of the confession. Defendant was warned and indicated that he fully understood what he was doing when he gave a question and answer confession before a woman court reporter some five hours after the first voluntary information. It was unnecessary to take him before a

magistrate under Oregon law. Federal rules, as indicated in McNabb v. U. S. 318, U. S. 332, 340, do noot apply in state criminal trials. Defendant was given assistance of able counsel, afforded an opportunity to review the confession during the trial, was arrested and made his confession on August 11, indicted on August 18, and if the defendant were not taken before a magistrate (1) the delay was after

---

(1) The record indicates that the State was silent when the court announced its version of a purported stipulation, as follows:

> "MR. RYAN: My understanding was that he hadn't been taken before a magistrate before he made the confession and he hadn't been taken before a magistrate at the time the confession was signed, approximately 24 hours later.
>
> "THE COURT: Substantially, as I recall it. I will accept counsel's statement as to what the stipulation was and so instruct the jury."

Counsel for the State did not have the Municipal Court record at hand during this colloquy and was unable to immediately locate the same. The State does not shrink from the effects of this stipulation which it contends went only to the voluntariness of the confession but in the interests of justice it should be noted that the record of the Municipal Court indicates that the defendant was charged with First Degree Murder on the 11th day of August, 1949, appeared in person before the Honorable J. J. Quillin, Municipal Judge, ex officio Justice of the Peace for the State of Oregon, a committing magistrate, and waived preliminary hearing and was held for the Grand Jury.

the confession and could not have been for any sinister purpose of coercion nor could his detention have been the cause of confession.

On the whole question as to whether the Supreme Court of Oregon erred in affirming the judgment and sentence of death, as specified in appellant's third assignment, appellee will rely upon the proposition that the Fourteenth Amendment of the Constitution of the United States does not limit the power of the states to try and deal with the crimes committed within their borders and it was not the intent to test by decision of the United States Supreme Court every ruling made in course of a state trial (Avery v. Ala. 308 U. S. 444, 446).

The appellee shall stand on the decision of the Oregon Supreme Court in this case (State v. Leland, 190 Or. 598; 227 P. (2d) 785; R. 4 to 36 inclusive).

ANSWERING THE APPELLANT'S ASSIGNMENT OF ERROR NO. 1, THE APPELLEE CONTENDS THAT STATUTES 26-929 AND 23-122 O.C.L.A. DO NOT DEPRIVE DEFENDANT OF HIS LIFE AND LIBERTY WITHOUT DUE PROCESS OF LAW AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES IN THAT THE SAID STATUTES PERMIT THE DEFENDANT TO INTRODUCE ALL OF HIS EVIDENCE BEARING UPON MENTAL INCAPACITY.

ARGUMENT

The appellee considers it to be axiomatic that every state is free to devise its own ways of securing essential justice and that it is no longer open to contention that the due process clause of the Fourteenth Amendment of the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein, so long as those procedures and practices do not offend the spirit of fairness and decency common to the notions of justice of English speaking peoples.

As said in Louisville & Nashville Railroad v. Schmidt, 177 U. S. 230, 236; 20 S. Ct. 620, 622.

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere

forms of procedure in state courts or regulate practice therein."

And in Hysler v. Florida, 315 U. S. 411, 416, 417; 62 S. Ct. 688, 691:

"Vindication of Constitutional rights under the Due Process Clause does not demand uniformity of procedure by the forty-eight States. Each State is free to devise its own way of securing essential justice in these situations. The Due Process Clause did not stereotype the means for ascertaining the truth of a claim that that which duly appears as the administration of intrinsic justice was such merely in form, that in fact it was a perversion of justice by the law officers of the state."

In Adamson v. California, 332 U. S. 46, 67, 68, 67 S. Ct. 1672, 1683, Mr. Justice Frankfurter stated:

"Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this court an exercise of judgment upon the whole course of the proceeding in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even towards those charged with the most heinous offense. These standards of justice are not authoritively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the due process clause imply that judges are wholly at large. The judicial judgment in applying the due process clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment. The fact that judges among themselves may differ whether

in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. *An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review.*" (Italics ours)

More recently in Gallegos v. Nebraska, Law Ed. Adv. Opinions of the Supreme Court of the United States, Vol. 96, No. 3, page 82 at 86, dated December 17, 1951, we find:

"A criminal prosecution approved by the state should not be set aside as violative of due process without clear proof that such drastic action is required to protect federal constitutional rights."

The statutes under consideration do not offend the spirit of fairness that must pervade every American trial in that they apply uniformly to all persons charged with crime within this state.

Section 26-929 O.C.L.A. in its pertinent part reads as follows:

"When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt; . . . ."

Section 23-122 O.C.L.A. reads as follows:

"A morbid propensity to commit prohibited acts, existing in the mind of a person, who is not shown to have been incapable of knowing the wrongfulness of such acts forms no defense to a prosecution therefor."

That Section 23-122 commits Oregon to the rule that one is punishable who is shown to have known the difference between right and wrong at the time a criminal act was committed and definitely rejects the irresistible impulse theory. One of our leading cases, cited by the Oregon Supreme Court many times, is State v. Wallace, 170 Or. 60 at page 79 (1942), where the Oregon court said:

> "The irresistible impulse doctrine has been definitely rejected, and that type of mental derangement does not relieve the actor from responsibility. State v. Hassing, 60 Or. 81, 118 P. 195 (1911); State v. Grayson, 126 Or. 560 at p. 575, 270 P. 404 (1928); State v. Riley, (supra). The rejection of the irresistible impulse doctrine and the adoption of the right and wrong test is supported not only by judicial decision, but also by legislative enactment." (citing 23-122 O.C.L.A.) (interpolation ours)

The foregoing two sections are applied at a criminal trial whenever the defense of mental incapacity is asserted. In their application the trial court also considers the following sections, Section 26-955 O.C.L.A. which reads as follows:

> "If the defense be the insanity of the defendant, the jury must be instructed, if they find him not guilty on that ground, to state that fact in their verdict, and the court must thereupon, if it deems his being at large dangerous to the public peace or safety, order him to be committed to any lunatic asylum authorized by the state to receive and keep such persons, until he become

sane, or be otherwise discharged therefrom by authority of law."

and Section 26-933 O.C.L.A. as follows:

"A defendant in a criminal action is presumed to be innocent until the contrary is proven; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to be acquitted."

All four of these sections were adopted in the original Oregon Code, Deady's Code, 1845 to 1864. They were enacted as a part of the Code of Criminal Procedure adopted by the legislature in October, 1864, and are the established legislative policy of the state.

By the act of June 27, 1844, the legislative committee of Oregon provided that the common law of England and the principles of equity not modified by the statutes of Iowa and this government and not incompatible with its principles, shall constitute a part of the law of the land. This law was retained at the time of the adoption of the Oregon constitution in 1857, Article XVIII, Section 7. (See, Perozzi v. Ganiere, 149 Or. 330, 345, 346; 40 P. (2d) 1009.

That the laws in question were rooted in the common law of England is well demonstrated by the decision rendered in the famous M'Naghten's case (8 English Reprint 718), where the Opinion of Judges (10 Clark & Fin. 205) laid down the rule that one who seeks to defend himself from a charge of crime must establish the fact that it must

be *clearly proved* at the time of committing the act the party accused was laboring under such defect of reason and disease of mind as not to know the nature and quality of the act he was doing or if he did know it, *he did not know he was doing what was wrong.*

The earlier English and American cases looked upon the defense of insanity with some suspicion and in order that it might not be abused, held that for a defendant to be acquitted on that ground his irresponsibility must be clearly proven (See Insanity as a Defense in Criminal Law, Weihofen, The Commonwealth Fund Publishers (1933) page 151).

The words "clear" and "clearly" have been interpreted as the measure of proof in most of our earlier cases. The courts usually held that an issue cannot be said to be clearly proved so long as a reasonable doubt remains (See, Weihofen, supra, 151, 152).

When Judge Deady drafted these statutes he evidently had in mind the English common law and the earlier American decisions which placed the burden upon the defendant to prove his insanity beyond a reasonable doubt. An annotation of People v. Sprague, 2 Park Criminal Reports of N. Y., 43 appears wherein the court charged at page 48:

> "That insanity as a defense was an affirmative matter; and in order to be allowed, must be proved beyond a reasonable doubt . . . being at the time incapable of knowing right from wrong."

Section 26-929 O.C.L.A. and Section 23-122 as well as 26-933 and 26-955 O.C.L.A. have never been modified and constitute the legislative policy of this state. They have been judicially affirmed commencing with State of Oregon v. Murray, 11 Or. 414, 5 P. 55, a decision rendered in 1883, through State v. Grieco, 184 Or. 253, 195 P. (2d) 183, and State v. Garver, 190 Or. 291, 305; 225 Pac. (2d). 771, decided in 1950, the Oregon Supreme Court has held that the defense of insanity must be proven beyond a reasonable doubt. That this procedure is now the legislative policy of this state, cannot be contradicted and is a settled usage of long standing within this state.

The appellee contends that the procedure required and the elimination of the so called "irresistible impulse doctrine" are not shocking to the canons of decency and fairness of Anglo Saxon peoples because they afford the defendant every right to a fair trial required by the American concept of due process of law.

Due process of law insures a fair and impartial public trial in accordance with established criminal procedure by an impartial judge and jury properly instructed. It requires the right to be heard and enjoy the assistance of counsel. In criminal cases it requires that the defendant be confronted with the nature and cause of the accusation against him and that he be furnished with a copy thereof. It requires that the defendant have compulsory process for ob-

taining witnesses in his favor. It requires that he be afforded the right to meet his witnesses face to face and be given full opportunity to cross-examine the same.

Under Section 26-933 O.C.L.A. the defendant is clothed with the presumption of innocence until the contrary is proven. Likewise the prosecution is required to establish the guilt of the defendant as well as all of the material elements beyond a reasonable doubt, to wit: that the defendant Morris Leland killed one Thelma Taylor; that the killing was done unlawfully, feloniously and purposely, and with deliberate and premeditated malice. That "purposely" meant an intent to do or commit the act charged in the indictment; that "deliberation" was the act of mind which examines and considers; that "malice" related to the actual state or condition of the mind of the person who committed the act; that "premeditation" is the process of thinking about the act before committing it; that deliberation and premeditation must have arisen while the *mind was in its normal state* and while the defendant was master of his own passion and temper; that the design must have been formed in cool blood; (R. 321-322) that if the mind fully and calmly forms a design to kill and the act is committed pursuant to such design, then it is premeditated, no matter how short or how long an interval of time may elapse before such design is executed (R. 323).

Similarly, the jury was instructed as required in Oregon

upon the elements of lessor included crimes, Murder in the Second Degree and Manslaughter (R. 323).

Following the full and complete instruction in accordance with the Oregon law upon the special defense of insanity, the court again instructed upon the effect of the elements of the crime of Murder in the First Degree and in the other degrees (R. 330 to 334), and required the state to establish every element of the crimes beyond a reasonable doubt. It further instructed that the evidence adduced during the trial to prove defendant's insanity shall be considered and weighed by the jury *whether or not they found the defendant to be insane in regard to the ability of the defendant to premeditate, form a purpose, to deliberate, act wilfully and act maliciously,* and further, *if the jury found the defendant lacking in such ability, that the defendant could not have committed the crime of Murder in the First Degree* (R. 330).

The court also instructed that the defendant *is presumed to be innocent* and that this presumption attends him throughout his trial until such time as the jury is convinced of his guilt beyond a reasonable doubt. (R. 326).

The court instructed the jury that the law presumed every man to be sane until he established in the mind of the jury beyond a reasonable doubt the fact of his insanity. This the court stated placed the burden of proving insanity upon the defense and that if the jury had any reasonable

doubt as to whether the defendant at the time of the commission of the alleged homicide was sane or insane, *such defense* should be rejected (R. 326). This procedure is not unknown to American law. As a matter of fact, with the exception of the quantum of proof required, to wit, "beyond a reasonable doubt" the procedure is followed in 22 states of the Union (Weihofen, Insanity as a Defense in Criminal Law, p. 148-149). See also Wigmore, Vol. 9, 3rd Ed. 1940, Art. 2501 (3).

We read in Morrison v. California, 291 U. S. 281 at 284:

> "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. Cf. Wigmore, Evidence, vol. 5, 2486, 2512 and cases cited."

It is the contention of the appellee that the presumption of sanity which is afforded the state in criminal prosecutions standing naked and alone *does not import guilt.*

Until the state has produced other evidence upon each and every material allegation of the crime charged, that the defendant is guilty, the defendant under Oregon pro-

cedure has nothing to prove. The presumption of innocence remains with a defendant throughout the trial until the contrary is shown beyond a reasonable doubt and that is all the defendant is entitled to. That is all the Oregon statute provides. That is all American courts have ever required in the spirit of fairness.

In passing upon the question of the special defense of insanity, the jury is required to return a special verdict and was so instructed in this case (R. 332, 334). The purpose of this special verdict is set forth in Section 26-955 O.C.L.A. previously quoted, which provides for the confinement of the defendant if the court deems him to be dangerous to be at large, without the necessity of any further trial by the court upon his mental condition.

Should the jury find, from the same evidence offered by the defendant upon mental incapacity, that the defendant is unable to or has not mind enough to premeditate, deliberate, entertain malice, form criminal intent, or commit any of the other elements of the crime, it is required to find the defendant not guilty in its general verdict (R. 332). Thus it seems to the appellee that the defendant was afforded the greatest possible protection in the consideration of his defense of mental incapacity, whether it be by legal insanity or otherwise.

Under Oregon law, the burden of proof in a First Degree Murder case never shifts during the trial but rests

upon the state to the close and the jury was so instructed (R. 324).

We therefore submit that so far as the burden and quantum of proof is concerned, the practice is entirely reasonable for should the jury fail to find the defendant to be legally insane beyond a reasonable doubt, but nevertheless find him to be mentally defective by a preponderance of the evidence, it has been instructed to consider this testimony upon the question of the elements of the crime and surely the state could not secure a conviction and sustain its burden of proof beyond a reasonable doubt if the jury thought the defendant to be mentally irresponsible.

The question as to whether the irresistible impulse doctrine is more modern than the right and wrong test has been debated for years. This question has been raised in Oregon many times and has been answered in an able decision found in State v. Riley, 147 Or. 89 at page 99, wherein the court held that under our statute and the early decisions of the Oregon court, the irresistible impulse doctrine has been definitely rejected and the right and wrong test adopted by statute and judicial decisions in this jurisdiction.

In the instructions in the instant case given by the court, this test was applied (R. 326) and there is testimony that this defendant could distinguish the difference between right and wrong, and that he had the ability to deliberate, premeditate, form a plan and act upon it (R. 290, 291).

Appellant in his argument makes much of a so-called modern conception of insanity and asserts that due process requires the law to keep abreast of scientific progress. He contends that the State of Oregon has not kept abreast of the modern trend of psychiatry and the law.

In answer to this contention the appellee calls attention to the elemental fact that it is a lay jury which passes upon the mental capacity of the defendant. If medical science has advanced, so is the lay jury given opportunity to hear the expressions of modern psychiatrists informed of the latest techniques. A psychopathic personality without psychosis is an individual who is not mentally ill but belongs to a great group whose personality structure is self-centered, hostile and insensitive for ethical or moral rights. They know the difference between right and wrong, and this disorder is one of emotions, basically, not of the intellect and the knowing (R. 289-290). They are capable of planning by conscious processes, differing from the psychotic patient whose planning contains many of the elements of the unconscious (R. 231).

In Adamson v. California (332 U. S. 46, 67 S. Ct. 1672) this court refused to set aside as unconstitutional and as invalid under the 14th Amendment to the United States Constitution certain provisions of California law which permitted the failure of a defendant to explain or to deny evidence against him, in a criminal trial, to be commented

upon by court and by counsel and to be considered by court and jury. It seems to us that the statute sought to be set aside in Oregon could not possibly shock the community more than the statute upheld in the California case (supra). It is urged that neither violates the principles of substantial justice.

Thus the procedures in Oregon excepted to by the appellant are not shocking to the community nor do they violate in any way the spirit of fairness that is within the concepts of the vague contours of due process.

Also these laws having their roots in the English common law are the settled customs and usages in Oregon and have been since statehood.

Reasonable minds may have differed upon the burden and quantum of proof required in a case but this Court has held that it will not disturb as violative of due process under the Fourteenth Amendment of the Constitution of the United States, settled usages and modes of procedure previously existing and of long standing. (Powell v. Alabama, 287 U. S. 45, 65; 53 S. Ct. 55, 62.)

Counsel for appellant in their brief have raised the point of prejudice preventing due process. Appellee answers this point by referring to parts of the decision of the Oregon Supreme Court wherein they stated that only counsel's un-

supported statement of a publication had so excited the public mind that the defendant could not obtain a fair trial unless a postponement was granted. The court further held that no evidence was brought before it, nor was the voir dire examination, and, it could be assumed that no such inflamed state of the public mind was disclosed (R. 8). Further, that there is no showing of prejudice against the defendant (R. 9).

The evidence in this case warranted only a verdict such as was rendered. The Supreme Court of Oregon opinion commented as follows:

> ". . . for the crime was so wanton and inhuman, *and so amply proved,* that any other verdict than one of guilty would have been a *shocking miscarriage of justice,* while the rights of the defendant were fully protected by a careful and able judge and no errors prejudicial to him were committed." (Italics ours) (R. 6)

This assignment is without merit.

ANSWERING APPELLANT'S SECOND ASSIGNMENT OF ERROR, THE APPELLEE STATES THAT THE COURT BELOW DID NOT ERR IN UPHOLDING THE REFUSAL OF THE TRIAL COURT TO MAKE AVAILABLE TO DEFENDANT'S COUNSEL BEFORE TRIAL A CONFESSION TAKEN FROM DEFENDANT PRIOR TO HIS BEING TAKEN BEFORE A MAGISTRATE AND ADVISED OF HIS RIGHT TO COUNSEL, AND THAT THE DEFENDANT WAS

NOT DEPRIVED OF HIS LIFE AND LIBERTY WITHOUT DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

We, of counsel for the appellee, feel that the contention of appellant's counsel is highly fanciful and that the construction placed thereon is almost fantastic. This is not a case where a poor ignorant Negro boy after being almost mobbed in a highly inflamed community was denied counsel and forced to trial, such as in the case of Powell v. Alabama, 287 U. S. 45; 53 S. Ct. 55, nor is it a case that is similar to a situation where the accused was questioned for about a week and finally on the last day, questioned all night and "broke at sunrise" such as in Chambers v. Florida, 309 U. S. 227; 60 S. Ct. 472. Neither is this a case where a 15 year old Negro boy was questioned through the dead of night by relays of police to force him to confess, such as in Haley v. Ohio, 332 U. S. 596, 68 S. Ct. 302. Nor is this a case where an accused was questioned for a prolonged period under bright lights during late night sessions continually for 36 hours without rest or sleep. Ashcreft v. Tennessee, 322 U. S. 143; 64 S. Ct. 921.

This is a case where the accused volunteered the information that he had murdered the deceased immediately

upon his arrest. The officers did not know that a murder had been committed and were making no efforts to pin a murder on anyone. What counsel might have done had he been appointed before Leland volunteered the information that he had committed a crime, is of course only open to speculation. However, we feel that the duty of a defense attorney goes no further in a case of this kind than that of advising the defendant of his rights and seeing that he gets a fair trial. Counsel had the opportunity to consult with the accused and to prepare his defense.

Counsel could have seen the confession during the trial and refused to take advantage of his opportunity. The court even offered to recess until he could fully prepare himself (R. 134). In this connection see State v. Leland, 190 Or. 598, 617; 227 P. (2d) 785 (R. 9, 15).

Counsel was appointed on the 22nd of August, 1949, and we submit had ample opportunity to consult with accused and prepare his case for trial (R. 284, 285, 317), which occurred on the 27th of October, 1949. In fact in passing upon this question, our Supreme Court at page 605 of the statement commented in their decision.

> "The defendant being without funds, the court appointed counsel to defend him. *In the best tradition of the Bar these gentlemen discharged their duty to their client with zeal and ability, both in the trial court and here.* That their efforts have been unsuccessful is no reflection upon them, for the crime was so wanton

and inhuman, and so amply proved, that any other verdict than one of guilty would have been a shocking miscarriage of justice, while the rights of the defendant were fully protected by a careful and able judge and no errors prejudicial to him were committed." (Italics ours.)

The true test of the admissibility of the confession in Oregon and we believe throughout the United States, is one of voluntariness. Any confession which is influenced by threats, coercion or hope of reward or other benefit is not voluntary. The burden is always on the prosecution to establish this. In Oregon, as well as many other states, it is unnecessary for officers to take an accused before a magistrate that he may be advised of his rights before taking a confession or statement. Common sense would indicate this to be a proper procedure.

There is no evidence in the facts of this case of the use of any force. In fact, counsel stated that he did not believe there was any force used (R. 132). There is nothing wrong with taking a confession of a defendant being in custody. There is nothing in the record that indicates defendant was kept awake all night (R. 136) to secure a confession but on the contrary the record clearly shows that Leland had confessed this crime when he came into the police station at 2:00 a.m. (R. 56-57), and the remainder of the time that early morning was occupied in corroborating his confession. Also that during the ensuing early morning hours he went

to the scene, identified the body and that during the trip to and from the site discussed what happened and had fully made an oral confession by the time he returned to the police station (R. 145, 146).

After being given his breakfast, a confession was taken by question and answer method before a woman reporter, which was a logical procedure. The confession itself shows that Leland was thoroughly advised of his rights by Deputy District Attorney John R. Collier (now deceased), and this appears patent upon the face of the confession. Moreover this is substantiated by witnesses. That Leland understood it was indicated by his own admission. That there was no fraud involved was indicated by the testimony of Captain Brown who stated that what he had said about the confession being used either for or against him would of course depend upon the substance of the confession. (R. 149)

The subsequent confession, State's Exhibit 18 (R. 367) taken at 10:00 p.m. clearly indicates that Leland knew the testimony in his confession would be used against him. During the taking of the subsequent confession at 10:00 p.m. the record indicates that the officers fully advised Leland as to his rights even though he had personally made a request to have the statement taken. (R. 153-154)

The confession, State's Exhibit 18, was read back to Leland, piece by piece, and elaborated upon by him. (R. 165). It was the natural thing for the evening shift officers

to review the reports and determine whether a statement had been taken. There is no evidence that Leland had not had any rest during the day Friday for at 4:15 that evening he was in jail. All of the officers testified that at no time were any threats or other methods of coercion used upon Leland and found that no promises of leniency or reward were extended to him. This is a case where the matter had been preying upon Leland's mind for a week and "the guilty flee when no man pursueth." The only information that the officers had up to the Leland confession was a missing persons report in regard to one Thelma Taylor, 15 year old girl who had left home on August 5, to go bean picking.

Under the holding in State v. Butchek (121 Or. 144 at p. 153; 253 P. 367), the court held it to be unnecessary for officers to advise an accused of his rights before taking a statement of confession, as that duty devolves upon the magistrate when the accused is taken before him. This rule is a firmly established practice in Oregon. It is approved in the very able opinion of Mr. Justice Brand in the case of State of Oregon v. Folkes (174 Or. 568, 580; 150 P. (2d) 17), where he stated:

> "A confession, even though made to police officers and while in custody, is admissible if not induced by fear, violence, threats, or promises of reward or immunity, and this is true although the accused may not have been cautioned that his statement might be used

against him or advised as to his legal rights. State v. Moore, 124 Or. 61, 262 P. 859; State v. Butchek, 121 Or. 141, 253 P. 367, 254 P. 805; State v. Stevenson, 98 Or. 285, 193 P. 1030; State v. Wilder, 98 Or. 130, 193 P. 444. The character of inducement which will render a confession involuntary is well stated in the case of State v. Green, 128 Or. 49, 273 P. 381. In that case, the court, speaking of a confession, said:

> "'. . . The only fair test, if such it may be called, which can be applied is this: Was the inducement held out to the accused such as that there is any fair risk of a false confession, for the object of the rule is not to exclude a confession of the truth but to avoid the possibility of a confession of guilt from one who is in fact innocent: . . .'"

This rule is a firmly established practice in Oregon.

It is significant that the confessions were made on the day of Leland's arrest. This would indicate that they were not influenced by long confinement in prison.

As was said by this court in Gallegos v. Nebraska, as reported on December 17, 1951, L. Ed. Adv. Opinions for the United States Supreme Court in volume 96, No. 3, page 82, 88 in discussing the rule of the McNabb case which counsel seeks to apply here:

> "The decision and judgment below determine for us that under the law of Nebraska such detention and examination, without appearance or arraignment, do not require exclusion of the confessions or plea as involuntary. The rule of the McNabb Case considered

recently in United States v. Carignan, No. 5, October Term, 1951 (..... U. S. ....., ante, 57, 72 S. Ct. .....), is not a limitation imposed by the Due Process Clause. McNabb v. United States, 318 U. S. 332, 340, 87 L. ed. 819, 823, 63 S. Ct. 608; Lyons v. Oklahoma, 322 U. S. 596; 597, note 2, 88 L. ed. 1481, 1483, 64 S. Ct. 1208. Compliance with the McNabb rule is required in federal courts by this Court through its power of supervision over the procedure and practices of federal courts in the trial of criminal cases. *That power over state criminal trials is not vested in this Court.* A confession can be declared inadmissible in a state criminal trial by this Court only when the circumstances under which it is received violate those 'fundamental principles of liberty and justice' protected by the Fourteenth Amendment against infraction by any state." (Italics ours)

In connection with the argument of appellant with reference to the invalidation of the confession by reason of not having been taken before a magistrate before it was made, the appellee rests its case on the above decision.

The facts bear out that Leland knew what he was doing and that it was wrong and the jury passed upon all of the testimony and the testimony of skilled psychiatrists versed in modern techniques, found that to be true. His actions clearly indicate this. He wiped his fingerprints from a lunch bucket; he covered the body in a thick clump of brush so that it could not be seen; he threw the murder weapons into the river so that they could not be found. He conversed with the officers during his confession and carefully led them to the scene of the crime.

Previously it had been determined by the psychiatrists at the Oregon State Hospital that he was sane in 1944 and in that determination the doctors had reported that it appeared that his commitment to the hospital was one of a means devised to escape punishment (R. 244).

Lastly, when the confession was taken and later signed by Leland the record indicates that it was thoroughly read to him while Leland kept a copy of it in his hands and followed it closely; that he made changes in the confession of addresses and initialed them and later that evening when he had given a confession in his own handwriting, he sat down with the officers and carefully elaborated on each sentence, piece by piece. It appears that the defendant gave a purely voluntary confession to a most dastardly and atrocious crime which was preying upon his conscience.

The court first considered it upon an offer of proof authorized in our procedures, (State v. Jordan, 146 Or. 504 at pages 509, 510, 511; 26 P. (2d) 558; 30 P. (2d) 751). The Oregon rule is well stated in State v. Layton, 174 Or. 217, 230 as follows:

> "As to the admissibility of defendant's confession, it must be borne in mind that when this confession was offered, the trial court in the absence of the jury conducted an inquiry preliminary to its admission; and at the conclusion of such inquiry the trial court overruled defendant's objection and held in effect that the confession of defendant was obtained without the influ-

ence of hope or fear. Under those circumstances, the determination of the trial court will not be disturbed unless there is clear and manifest error. State v. Blodgett, 50 Or. 329, 92 P. 820; State v. Spanos, 66 Or. 118, 120, 134 P. 6; State v. Morris, 83 Or. 429, 440, 163 P. 567; State v. Stevenson, 98 Or. 285, 193 P. 1030, and authorities there cited."

The evidence introduced by the state as to the voluntariness of this confession is uncontradicted.

This assignment is also without merit.

ANSWERING APPELLANT'S ASSIGNMENT OF ERROR NO 3, THE SUPREME COURT OF OREGON PROPERLY SUSTAINED DEFENDANT'S CONVICTION AND SENTENCE TO DEATH IN THE LETHAL CHAMBER.

ARGUMENT

This Third Assignment is an endeavor by the appellant to enlist this court in the ardous task of reviewing all of the copious objections presented by counsel to the Oregon Supreme Court.

The appellee rests his argument so far as this assignment is concerned upon the decision of the Oregon Supreme Court in the case of State v. Leland, 190 Or. 598, 609; 227 P. (2d) 785 (R. 4 to 36), and upon the fact that the United States Supreme Court will not invoke its prerogative under due process to test for decision every ruling made in the

course of a state trial, Avery v. Alabama (308 U. S. 444, 446; 60 S. Ct. 321), so long as adequate and appropriate procedural standards to protect the accused are maintained at all times. (See Chambers v. Florida, 309 U. S. 227, 60 S. Ct. 472), as was done in the case at bar as the record clearly indicates.

CONCLUSION

This case was tried before an honorable and capable jurist who is the senior trial judge in this jurisdiction. He is thoroughly experienced in criminal law and the rights of the accused were meticulously and carefully safeguarded.

The Fourteenth Amendment is designed for the equal protection of all the citizens of all the states composing this great United States. It is designed to protect all society as well as due process for the guilty.

The appellant was defended under the best traditions of the bar by able counsel. The appellant in the instant case received every consideration and constitutional guaranty to which he is entitled. He was tried before an impartial judge and honest jury and in an atmosphere of judicial calm. The evidence on this crime was so wanton and inhuman and so amply proved that any other verdict

than one of guilty would have been a shocking miscarriage of justice.

The decision of the Oregon Supreme Court should be permitted to stand and judgment affirmed.

Respectfully submitted,

JOHN B. McCOURT,
District Attorney,
Multnomah County,
Portland, Oregon.

J. RAYMOND CARSKADON AND
CHARLES EUGENE RAYMOND, ESQ.
Deputy District Attorneys,
Portland, Oregon.

GEORGE NEUNER,
Attorney General
for State of Oregon,
Salem, Oregon,
Attorneys for Appellee.